

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	:	21CR80 (NGG)
Plaintiff,	:	
-against-	:	United States Courthouse
DOUGLASS MACKEY,	:	Brooklyn, New York
Defendant.	:	Friday, May 6, 2022
	:	4:00 p.m.

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TRANSCRIPT OF CRIMINAL CAUSE FOR MOTION HEARING  
BEFORE THE HONORABLE NICHOLAS G. GARAUFIS  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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1 (In open court.)

2 (The Hon. Nicholas G. Garaufis, presiding.)

3 (Defendant present.)

4 THE COURTROOM DEPUTY: Criminal cause for a motion  
5 hearing.

6 Counsel for the Government, please state your  
7 appearances for the record.

8 MR. PAULSEN: Good afternoon, Your Honor. Erik  
9 Paulsen and Olatokunbo Olaniyan for the U.S. government.

10 THE COURT: Good afternoon.

11 MR. FRISCH: And for Mr. Mackey, Andrew Frisch.  
12 Good afternoon. And Mr. Mackey is present.

13 THE COURT: Good afternoon.

14 Please be seated, everybody.

15 And we have someone on the phone as well?

16 THE COURTROOM DEPUTY: Mr. Gullotta.

17 MR. GULLOTTA: This is Mr. Gullotta from the Public  
18 Integrity Section on behalf of the United States.

19 MR. PAULSEN: Thank you, Your Honor, for letting him  
20 appear. He's been ill and didn't want to be here in person.

21 THE COURT: Well, feel better.

22 MR. GULLOTA: Thank you, Your Honor.

23 THE COURT: So this is on a motion for a bill of  
24 particulars and let me hear from the defense first.

25 MR. FRISCH: Thank you, Judge. So --

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1 THE COURT: And welcome, nice to see you again.

2 MR. FRISCH: Good to see you, Your Honor. Thank  
3 you.

4 I think the parties' submissions on this motion have  
5 served and I think productively so to refine the issues that  
6 we're here to talk about today. Mr. Mackey seeks something  
7 different from what the Circuit has described as the whats,  
8 the wheres, the with whoms, of which particulars are  
9 inappropriate. For what he's seeking there's no prejudice to  
10 the Government in clarifying the conflicting publicly  
11 available information; that is, by saying in a Rule 7(f), Bill  
12 of Particulars, which of the four conspiratorial objects apply  
13 here.

14 There's no prejudice to the Government in doing so  
15 in a Rule 7(f) form to answer the question, given that the  
16 crime is conspiratorial intent, did Mr. Mackey's intent do one  
17 of those four things, yes or no. I'm not asking for the  
18 detail if the answer is yes. We'll figure it out and if we  
19 have questions we'll talk to that more informally, but our  
20 requested particular calls for a yes or no answer. And,  
21 lastly, staying in a (f) form what they otherwise say in sum  
22 and substance at page ten of their memorandum of law, but not  
23 in the same way that it has the same effect as a pleading,  
24 which is: Is Mr. Mackey charged with posting two deceptive  
25 images or so-called memes to a Twitter account in the context

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1 of participating in chat rooms frequented by publicly  
2 like-minded others. The Government may quibble with my choice  
3 of words, that's fair. But to say it in a Rule 7(f) Bill of  
4 Particulars as opposed to page ten --

5           Here is why this is important because I think the  
6 overlay between this motion and the motion to dismiss is  
7 precisely why it's important. We're about to dig in on a  
8 motion to dismiss on some especially important Constitutional  
9 issues of first impression. I don't think it's hyperbole to  
10 say that not just Your Honor or Mr. Mackey and the people in  
11 this courtroom are going to be dealing with these issues, but  
12 I don't think it's hyperbole that this colloquy, and the  
13 colloquy to follow on subsequent motion practices, is going to  
14 be looked at by judges, legislators and law clerks and  
15 Congressional staffers and think groups about whether or not a  
16 Constitutional needle of sorts can be thread without  
17 puncturing protected rights, like the freedom of speech and  
18 the freedom of association.

19           And even more so in the context of Twitter, where  
20 Judge Abrams across the river recently said, and this is a  
21 paraphrase: It's a shooting gallery akin to the wild west  
22 where verbal gunslingers engage in prolonged, hyperbolic  
23 crossfire.

24           So, I think we all need to be reading from the same  
25 hymn book before we start digging into what are going to be

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1 intricate and difficult motions with or without the requested  
2 particulars and all we're seeking to do is to find the  
3 landscape.

4           The requested particulars that we lay out on page --  
5 that I lay out on page 18 of my initial brief but which I have  
6 summarized just now by the three things that I think should be  
7 in a Rule 7(f) Bill of Particulars give us answers to defend  
8 the case. They help the Court in resolving the Constitutional  
9 issues raised by this case and they -- and they narrow the  
10 focus in what otherwise is going to be, I think, interesting,  
11 but certainly intricate and intense litigation on important  
12 Constitutional issues.

13           THE COURT: Mr. Paulsen?

14           MR. PAULSEN: Thank you, Your Honor. I think in  
15 this particular case, Your Honor, the Government believes that  
16 it's been fairly clear about what its allegation is. The  
17 defense as it notes in its briefing, the indictment in this  
18 case which is a notice indictment which tracks the statute is  
19 itself brief, but it was preceded by a 25-page complaint in  
20 which the Government laid out its theory of this case and if  
21 it is not already clear, the Government has made it clear that  
22 the Government believes that the conduct outlined in the  
23 complaint violates the statute 18 USC 241.

24           The government went into a long discussion of what  
25 bills of particulars are for and what they are for not, what

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1 what they can do and what it's not supposed to do in its  
2 briefing because the Government believes that the requests  
3 that are being made by the defense counsel in this case go  
4 beyond the notice requirement that a bill of particulars is  
5 meant to address. The Bill of Particulars is about notice.  
6 It's, does the defendant understand what he's being charged  
7 with.

8           The complaint, the voluminous discovery, numerous  
9 search warrant affidavits which all go into the details of the  
10 case in addition to the indictment, the Government submits  
11 that all of these documents together make it quite clear what  
12 it is that we're charging. Frankly, much of the briefing is  
13 an attack on the Government's charging theory, but that attack  
14 suggests that defense counsel does know what it is that we are  
15 charging. They disagree with it, clearly, and we anticipate  
16 that there will be some robust briefing on the motion to  
17 dismiss on these topics because I think defense counsel knows  
18 what the government is alleging. They just purely don't  
19 agree. The four specific requests that were put forward --

20           THE COURT: They don't agree there's a legal basis  
21 for utilizing the statute for the conduct that the  
22 defendant -- some of the conduct that the defendant arguably  
23 or admittedly was involved in on Twitter.

24           MR. PAULSEN: Precisely, yes, Your Honor. I think  
25 that's right. But I think the reason defense counsel can

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1 essentially make these arguments to Your Honor in these papers  
2 at this juncture is because they do understand what the  
3 Government is alleging. They frankly think it doesn't fit  
4 under 241, the statute, or there's other Constitutional  
5 infirmities.

6 THE COURT: I understand your position and I  
7 understand the defendant's position, but looking at the fourth  
8 issue raised by the defense, which is the basis for venue, I'm  
9 curious about the Government's -- that's a -- that's a pretty  
10 straightforward legal question or it used to be anyway --

11 MR. PAULSEN: Yes, Your Honor.

12 THE COURT: -- before the internet.

13 What is your theory of venue in this case involving  
14 a Twitter feed?

15 MR. PAULSEN: Yes, Your Honor, the -- as we noted in  
16 page 14 of our brief, the Government's theory is primarily  
17 that the defendant used Twitter, which is a social media  
18 application that is meant to broadcast messages far and wide.

19 THE COURT: Far and wide?

20 MR. PAULSEN: Yes, Your Honor.

21 THE COURT: So, would you say that there's venue in  
22 every state and hamlet of America based on the fact that it  
23 could be -- a Twitter feed could be received or seen anywhere  
24 in the country?

25 MR. PAULSEN: Potentially, Your Honor. And the

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1 Government isn't making that allegation but I think there are  
2 child pornography cases, for example, that gesture in that  
3 direction; when materials are put on the internet such that  
4 they can be grabbed in any place, that could be a possible,  
5 you know, consequence of the use of a social media application  
6 like Twitter, but in this particular case, Mr. Mackey was  
7 living in New York around that time. He was living across the  
8 river in the Southern District of New York, but the  
9 Government's assertion is that the use of Twitter in this, he  
10 did foreseeably avail himself of the EDNY District --

11 THE COURT: All right --

12 MR. PAULSEN: Your Honor, we did answer, although we  
13 do not believe that this is necessary, given that -- the  
14 posture of the case at this moment in the posture of a bill of  
15 particulars. We did in essence answer it.

16 THE COURT: We will have to address this when we  
17 come to the motion to dismiss.

18 MR. PAULSEN: Yes, Your Honor. But --

19 THE COURT: I am just curious I'm trying to get  
20 ahead of the project to see what's next. You know counsel  
21 says that, you know, this is a case of first impression and,  
22 you know, people are going to be looking at this. I look at  
23 it a little differently. My view is that it's the first stop  
24 on the local and there are 42 stations after this station.

25 So whatever this court does is going to be examined



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1 at other levels and in other courthouses and so forth in that  
2 it will be useful to other judges. I don't see this as the  
3 holy grail that I'm about to issue. Let me just point that  
4 out.

5 MR. PAULSEN: Yes, Your Honor. In regard to the --  
6 there is one other aspect of the motion that the government  
7 found troubling which we brought to your attention. On page  
8 13 of the defendant's brief he asked the Court to quote  
9 unquote, bind the Government to answers to these particulars.  
10 The Government believes that the particular themselves go  
11 beyond the notice requirements of the bill of particulars but  
12 further there seems to be some effort at this early stage in  
13 what will likely be some robust litigation to not just ask for  
14 the things that the Government believes are frankly factual,  
15 but to ask that the Government essentially be held to its  
16 answers.

17 The case law that we address in pages eight to nine  
18 of our brief, make clear that the purpose of a bill of  
19 particulars is not to lock the Government into certain  
20 answers. The Government is entitled to develop its case as it  
21 goes towards trial. As is often the case, the Government will  
22 review evidence and make connections among the way or realize  
23 the importance of some piece of discovery that was not before  
24 fully appreciated. It seems that part of what is happening  
25 here is that the defense is not necessarily looking for

1 clarity but looking to lock the defendant -- the Government  
2 into answers that we just don't believe at this juncture we're  
3 required to give.

4 But, that being said, Your Honor, there is -- I  
5 think in the larger sense I don't believe the parties are  
6 misunderstanding each other. We have attempted through our  
7 complaint to make clear what our charging theory is and we  
8 have had discussion with defense counsel about that. To the  
9 extent that defense counsel has pointed out a press release or  
10 a -- I think there's a Reuters article with some anonymous  
11 people talking about the case, the Government wants to make it  
12 crystal clear to the extent we are provided notice about what  
13 our charging theory is, that notice is the indictment, the  
14 complaint, the various affidavits and the discovery.

15 Those are the things that we are relying upon and we  
16 want to be clear that in the complaint we are saying that that  
17 conduct violates a statute that that's the Government's theory  
18 of the case.

19 THE COURT: Mr. Frisch, aren't most of these  
20 arguments better left for a motion to dismiss? What is it  
21 that is lacking? That's what I am trying to get to? What is  
22 lacking in the materials that have been provided thus far that  
23 is so essential to your ability to make a motion?

24 MR. FRISCH: Well, there certainly is an overlay and  
25 there are certainly issues that are raised in this motion that

1 are -- that will be part of the litigation on a motion to  
2 dismiss. However, this is the unusual case where there is so  
3 much publicly available information that sheds light on what  
4 this is about. The Government should not be permitted to pick  
5 and choose; look at this, look at that.

6           What the Government should do is say in a Rule 7(f)  
7 Bill of Particulars, this is it. I'm not asking them for  
8 evidentiary detail. I'm not seeking to limit their  
9 presentation of proof, but they indicted this case. They have  
10 used language in the litigation of this motion that what  
11 Mr. Mackey did is interfere with the right to vote. That word  
12 doesn't appear in Section 241 of the charged crime. It  
13 appears in Section 245. So which is it; interfere, injure,  
14 oppress, threaten or intimidate?

15           Telling us which one of those does not limit them  
16 and it's not the withs, wheres, whats and with whoms that the  
17 Second Circuit said is beyond the scope of this kind of  
18 motion. It's precisely what are you charging him with. There  
19 is the press release where the United States attorney of this  
20 district and also the Southern District of New York, gave the  
21 public a comprehensive paragraph of what voting law prohibits.  
22 What I think is in this case is not in there and maybe that  
23 means that I have read the bread crumbs correctly and the tea  
24 leaves correctly, but that's not what the Constitution  
25 requires.

1           The Constitution requires, due process requires for  
2 the Government to say so and not rely on the defendant's  
3 ability to figure it out. Here, in this case, where it's  
4 unprecedented there is no preexisting template and it's  
5 confusing as to what they're saying.

6           My concern is -- one of my concerns is this: If  
7 it's so clear why not put it in a Rule 7(f) or are they  
8 concerned that if they do so, it's going to be more apparent  
9 than not that there is no proper Constitutional basis for this  
10 prosecution, so it's the unusual array of publicly available  
11 information, the Government's own use of the word  
12 "interference," the FBI saying that what Mr. Mackey did is  
13 essentially steal votes, the failure of anything like this  
14 case to be in the Public Integrity Section's comprehensive  
15 compendium of long-related cases that requires the Government  
16 to answer simple questions that are not what the Second  
17 Circuit -- not what the Second Circuit prohibits.

18           I think on venue, you will have -- to use  
19 Mr. Paulsen's word, a robust discussion about venue and the  
20 recent Third Circuit case on that issue to see whether in  
21 fact the Eastern District of New York is what the law refers  
22 to as the locus delicti of this crime or whether it's  
23 appropriate in the era of mass interconnectivity for the  
24 Government to pick and choose to bring a case anywhere.  
25 That's an issue we will be litigating before Your Honor for

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1 sure.

2 But I think given the conflict about all the  
3 available information about what precisely this case is and  
4 given the willingness to say so, I don't understand the  
5 resistance and reluctance to do it in a Rule 7(f) form.

6 MR. PAULSEN: As I noted a moment ago, there are  
7 various sources that have discussed this case, but I would  
8 like to be clear there is a complaint that is sworn out by our  
9 case agent and there's an indictment that's signed by the U.S.  
10 Attorney. Those are the documents that we're referring to.  
11 To the extent that there are other documents out there that  
12 seem to suggest something slightly different, I would ask that  
13 the defendant rely upon the case documents here, the actual  
14 complaint sworn out that initiated this prosecution.

15 THE COURT: I think a question is are you going to  
16 limit yourselves to the reasonable scope of what's in the  
17 complaint or are you going to engage in a broader enterprise  
18 of looking at -- there are so many materials on this subject  
19 around -- that are floating around in the ether and are the  
20 subject of commentary on Fox and MSNBC and the Wall Street  
21 Journal and the New York Times on what has happened to the  
22 body politic in regard to the electoral process and that's  
23 still happening.

24 MR. PAULSEN: Yes, Your Honor.

25 THE COURT: I mean, all you need to do is turn on

1 the television on Channel 7 at 8 a.m. in the morning and  
2 they're having a debate over the electoral system and  
3 redistricting and other issues. So there is a plethora of  
4 material and I think Mr. Frisch's point at least is that there  
5 has to be some structure and the question from the Court at  
6 this point as posed is do I insist upon a structure to be  
7 defined by a bill of particulars?

8 MR. PAULSEN: Yes, Your Honor. I would answer it  
9 this way: First off, this case is obviously about a narrow  
10 two-month period in 2016.

11 THE COURT: Right.

12 MR. PAULSEN: And so although there is obviously  
13 interesting things happening in the world these days, this is  
14 about what happened six years ago. The I don't think the  
15 defendant would disagree that the complaint the search warrant  
16 in this case have all been fairly consistent in the conduct  
17 that's alleged as being at the core of this investigation. To  
18 the extent that words like "interfere" which I used a synonym  
19 for the conduct in the brief, which led Mr. Frisch to believe  
20 we were referencing 18 USC 245. It's not the case. It's  
21 still 18 USC 241. Your Honor will see when we brief this in  
22 the motion to dismiss that the statute uses four verbs to  
23 describe the kind of conduct. The jury instructions on these  
24 matters talk about these are terms of art that encompass a  
25 type of activity which is -- which we believe encompasses the

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1 conduct that is described in the complaint, but we do think it  
2 would be inappropriate, Your Honor, to -- the invitation to  
3 essentially ask that the Government's case be essentially  
4 frozen in amber at this point because of a difference in verb  
5 between a complaint and a brief.

6 As all of the bill of particulars cases state, the  
7 Government is entitled to develop its evidence and develop its  
8 case on the way to trial. That being said, I anticipate the  
9 core of it will be exactly what has been alleged. In all the  
10 documents in this case, that is the government's intent and  
11 that's what the discovery that defense counsel has supports.

12 THE COURT: Can I ask a question about legislative  
13 history here?

14 MR. PAULSEN: Sure.

15 THE COURT: Have you examined the legislative  
16 history of the statute which is post velum statute during  
17 reconstruction?

18 MR. PAULSEN: Yes, Your Honor.

19 THE COURT: Have you?

20 MR. PAULSEN: I've read the cases, yes, and I've  
21 read the commentary that Mr. Frisch provided us. I know the  
22 statute came up in various senate hearings over the years. I  
23 don't know that I've reviewed the legislative history from the  
24 Klu Klux Klan Act precisely, but I've read it extensively.

25 THE COURT: Sometimes there have been efforts to

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1 enact legislation that would deal with this type of situation  
2 and it has not -- Congress has not enacted additional  
3 legislation to modernize, if you will, the resources that are  
4 available to deal with what you claim is -- what you might be  
5 claiming, what you might be claiming is the conduct here.

6 MR. PAULSEN: Yes, Your Honor. There have been  
7 efforts. There was -- one of Mr. Mackey's tweets was on a big  
8 poster board in a 2017 senate committee in which they  
9 discussed adding additional prosecutorial tools and Mr. Frisch  
10 pointed out that statute didn't pass. That's right. But,  
11 Your Honor, the DOJ's Election Protection Division and the  
12 Civil Rights Division which handles these sorts of cases, they  
13 are obviously supportive of new tools that would allow the  
14 government to address conduct such as this, but they take the  
15 position that existing tools such as 241 do encompass this  
16 activity. It's obviously the case the Government is looking  
17 for additional ways for dealing with certain conduct, but  
18 that's not the same as saying the existing tools can't reach  
19 it. There are many reasons to which there would be additional  
20 statutes in this sort of sphere which is not the same as  
21 saying the existing statute can't reach it. I mean, that will  
22 obviously be an issue of dispute in this case.

23 THE COURT: Which of the four words in the statute  
24 most closely -- most closely addresses the conduct that you  
25 say is illegal?



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1 MR. PAULSEN: I believe the first, Your Honor the  
2 first, injury.

3 THE COURT: I am not going to resolve this this  
4 afternoon, but it's useful to have your views on it, frankly.  
5 I have generally over the last 22 years taken a -- my  
6 perspective has been if there is a complaint and if discovery  
7 has been fulsome, that the Court is not going to require a  
8 bill of particulars. This is an unusual situation. So I'm  
9 going to give it a close look. But I do think that many of  
10 these questions need to be addressed in your motion to  
11 dismiss.

12 Did you want to talk about the motion to dismiss  
13 schedule?

14 MR. FRISCH: A schedule was set -- the Government  
15 and I were talking about that before Your Honor took the  
16 bench.

17 THE COURT: I have it here.

18 MR. FRISCH: We talked about the need to maybe  
19 adjust some of the dates for one reason or another and we  
20 thought maybe the best way to handle it is to see how the  
21 drafting goes and if we need to propose to the Court that we  
22 recalibrate the schedule, we do it closer to the current due  
23 date as opposed to doing it today, but we probably envision  
24 some kind of recalibration of one sort or another.

25 THE COURT: In doing so would you consult with

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1 Mr. Raccoppa, my case manager, so we can establish a date for  
2 oral argument that works for everybody and then I will exclude  
3 speedy trial time until that date.

4 MR. FRISCH: Of course, Judge, yes.

5 THE COURT: Is there anything else for today from  
6 the Government?

7 MR. PAULSEN: May I consult with my partner?

8 (Pause in proceedings.)

9 MR. PAULSEN: Your Honor, I don't have anything else  
10 to add. I'm certainly happy to address any other questions  
11 you have on this, but it sounds like Your Honor is up to speed  
12 on the facts.

13 THE COURT: I think so.

14 Is there any other paperwork on this that you wish  
15 to submit on this?

16 MR. FRISCH: I don't think so, Judge, no.

17 THE COURT: All right. Where does Mr. Mackey live  
18 actually?

19 MR. FRISCH: He lives in the State of Florida.

20 THE COURT: He lives in Florida?

21 MR. FRISCH: Yes.

22 THE COURT: All right. Well, I will reserve and let  
23 you know as soon as possible.

24 MR. FRISCH: Thank you, Judge.

25 MR. PAULSEN: Thank you.

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1 THE COURT: Have a nice day, have a good weekend.  
2 Safe travels.

3 MR. PAULSEN: Thank you, Your Honor.

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5 (Matter adjourned.)

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